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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BARNABA BIENKOWSKI et al., Plaintiffs and Appellants, v. RICKY LAM, Defendant and Respondent.	A145551 (San Francisco City and County Super. Ct. No. CGC-13-534099)

Appellants are a group of tenants (Tenants)[1] who brought suit against their landlord, alleging the premises he rented to them were illegal dwelling units and not in habitable condition. Tenants also named Ricky Lam, the landlord's brother-in-law, as a defendant, contending he was an undisclosed partner of the landlord. Lam moved for summary judgment, arguing he had no ownership interest in the units or in the landlord's rental business, and thus had no liability for Tenants' injuries. The court granted summary judgment. We affirm.

I. BACKGROUND

In September 2013, Tenants sued Lam, Lawrence Choy, Christina Sutton and unnamed Doe defendants. As alleged in their operative May 2014 third amended complaint, Tenants rented units in two San Francisco properties (Properties) at various times between 2008 and 2010. They alleged both Choy and Lam were "the legal owners, lessors, operators, managers, and maintainers" of the Properties. Only Choy signed

[1] Appellants include Barnaba Bienkowski, Julia Dickinson, Kyla Ferguson, Antoinette Flores, Matthew Flores, and Janet Villanueva.

Tenants' leases as "Owner" or "Landlord." Tenants alleged Choy and Lam were both "liable for constructing . . . illegal units and allowing the illegal units to be rented to [Tenants] with full knowledge of their illegality," failing to maintain the units in habitable condition, and ratifying the actions of Sutton, a property manager who failed respond to some Tenants' requests for repairs.[2] Tenants brought causes of action for negligence, breach of the implied warranty of habitability, breach of the covenant of quiet enjoyment, violation of the San Francisco Rent Ordinance, intentional infliction of emotional distress, fraud, and violation of Civil Code section 1942.4.

In a July 3, 2014 written discovery response, Tenants alleged the basis of Lam's liability: "*On information and belief*, [Lam] participated with [Choy] in a conspiracy to purchase single-family homes, add units to them without the proper permits or zoning permissions, and illegally rent them to multiple, separate sets of tenants. It is *believed that* [Lam] is directly involved with [Choy's] efforts to buy and modify real property in San Francisco. [Lam] was on title to at least two of the properties, and it appears that but for [Lam's] involvement [Choy] was not able to buy these properties. *Likely*, banks refused to extend additional credit to [Choy], thereby necessitating [Lam's] involvement. [Lam] stipulated to a $100,000 judgment in favor of the City of San Francisco related to multiple properties, and . . . the judgment was not allocated to any specific properties, and then [Lam] apparently paid off at least half of the Judgment directly. [Lam] has no visible source of income, so he is *likely* obtaining monies from rental of the properties." (Italics added.) Tenants also alleged discovery was continuing.

Motion for Summary Judgment

In December 2014, Lam moved for summary judgment. In a supporting declaration, Lam averred he had no personal or professional relationship with the Tenants or the Properties. He was married to the sister of Choy's wife, and he and Choy previously co-owned two properties (Co-owned Properties). "My role in both those

[2] Tenants dismissed Choy from this appeal. Sutton separately settled Tenants' claims.

properties was limited to providing part of the down payment of the initial financing for the purchase of both [Co-owned Properties] as an investment with [Choy]. After my financing contribution was completed, I had no other active involvement in the ownership, operation or management of either property." Although Sutton served as property manager for both the Properties and Co-owned Properties, Lam personally had no contact or involvement with her. He "did not know [Choy] bought [the Properties], and had no role in any way whatsoever with [Choy's] activities regarding his ownership, or rental, of [the Properties]. He did not consult with me, seek or receive my advice, as to ownership or operation of [the Properties]. I received no benefit to my knowledge from [Choy's] ownership or operation of [the Properties]." As of February 2013, Lam no longer held any financial interest in the Co-owned Properties.[3]

Lam confirmed that, in February 2013, he stipulated to a judgment and injunction in an action brought against him and Choy by the City and County of San Francisco (City) alleging building code violations in four properties—the Properties, one of the Co-owned Properties, and a fourth property owned solely by Choy. (*City and County of San Francisco v. Choy* (Super. Ct. S.F. City and County, 2013, No. CGC 11 512-341.)[4] The City contended the Properties and one of the Co-owned Properties were public nuisances because "Plaintiffs [*sic*] have constructed additional and separate units within each . . . without permits and rented them out to tenants, in violation of the law." Without an admission of liability, Lam and Choy jointly agreed to pay $100,000 in civil penalties and the City's attorney fees and costs. The full money judgment applied to both Choy and Lam and was recorded as a lien against each of the four properties. Choy and Lam also stipulated to an injunction that required them to abate notices of violation issued by the City's Department of Building Inspection, maintain the properties in compliance with statutory standards, and keep tenant lists and written rental agreements for City

[3] One of the two Co-owned Properties was apparently foreclosed upon, and Lam was taken off the title of the other.

[4] Lam requested judicial notice of the stipulated judgment, and of a concurrent order granting ex parte application for stipulated injunction. Tenants did not oppose.

inspection. The injunction, however, specifically applied only to "Defendant LAWRENCE CHOY" and his agents as to all four designated properties and was "applicable to Defendant RICKY LAM, his agents, servants, employees, representatives, assigns, tenants, lessees, and to all persons who are acting in concert with Defendant RICKY LAM, in connection with [the one Co-owned Property]."

Lam's 26-item separate statement of undisputed material facts set forth his denials and affirmative averments, supported by his declaration and attached exhibits, including the stipulated judgment and injunction.

Opposition

In opposition, Tenants reiterated their theory that Lam was a participant in a real estate venture with Choy that extended beyond his interest in the Co-owned Properties, and as Choy's partner in this broader venture Lam shared liability for breaches of the partnership's duties to Tenants. "One of the main allegations of wrongdoing against [Lam] is that [he] participated in the real estate business operations of [Choy] which was known as 'First Choice Rentals' as well as 'SF Bay Leasing' along with his brother-in-law, wife and sister-in-law. Defendant does not deny this allegation but rather attempts to indicate that his name is not on title to certain properties."

Tenants focused primarily on the stipulated judgment and injunction in the City's 2013 case and an excerpt from Lam's July 2014 deposition testimony, which they claimed contradicted his declaration in support of the summary judgment motion and showed he contributed funds to the purchase of Choy's properties. Tenants also argued, without reference to any supporting evidence, "Lam has a real estate background, so any reasonable person in his circumstances would have known that he was actively participating in this business." Tenants referred to deposition testimony of a Choy tenant who stated he once dropped off his rent check at Lam's house, and to agreements between Choy and Sutton's property management company that covered the Properties, Co-owned Properties, and a fourth property in 2010 and 2011. The Tenants' separate statement of undisputed material facts either objected to, or denied, the 26 items in Lam's separate statement, but made no specific citation to evidence in support of their denials.

Tenants complained that "Defendants" had made discovery "difficult" and had refused to produce key documents. They requested a continuance to conduct further discovery to oppose the motion. (See Code Civ. Proc., §437c, subd. (h).)[5] Specifically, Tenants sought to complete the deposition of Choy's wife, take additional testimony from Lam, "obtain the documents which apparently evidence the contribution of funds to the purchase of the properties by [Lam]," and "obtain the documents by which [Lam and Choy] transferred title to real property recently . . . ." The trial court granted Tenants' request for a continuance to conduct additional discovery. Tenants were ordered to resubmit their response to Lam's separate statement "in compliance with CCP 437c(b)(3)"[6] by March 27, 2015.

On April 10, 2015, the trial court again continued hearing on the summary judgment motion because Tenants' separate statement "[failed] to cite to any evidence in support of [their] contentions that certain facts are disputed." The court noted Tenants' failure to comply with California Rules of Court, rule 3.1350(f)[7] "deprives the court of

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[5] Undesignated statutory references are to the Code of Civil Procedure.

[6] Section 437c, subdivision (b)(3) provides: "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. *Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence*. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (Italics added.)

[7] California Rules of Court, rule 3.1350, specifies the required content and format of motions for summary judgment, and for opposition to such motions. Subsection (f) of the rule addresses the content of a separate statement in opposition to the summary judgement motion and provides, in pertinent part: "(1) Each material fact claimed by the moving party to be undisputed must be set out verbatim on the left side of the page, below which must be set out the evidence said by the moving party to establish that fact, complete with the moving party's references to exhibits. [¶] (2) On the right side of the page, directly opposite the recitation of the moving party's statement of material facts and supporting evidence, the response must unequivocally state whether that fact is 'disputed' or 'undisputed.' An opposing party who contends that a fact is disputed must state, on

the ability to consider the separate statement" (citing *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co., supra,* 133 Cal.App.4th at p. 1211). Tenants were ordered to file a compliant separate statement by April 16, 2015, and they were warned that failure to comply with California Rules of Court, rule 3.1350(f) "will result in the motion being granted."

Tenants filed an amended separate statement on April 16, 2015, in which they listed evidence they relied upon, citing primarily to Lam's deposition testimony regarding the Co-owned Properties. Tenants asserted that the testimony revealed Lam—by providing his signature on loan and title documents—provided assistance to Choy in an "overall plan to purchase rental properties contributed to Mr. Choy's rental business and the rental of illegal units to [Tenants]." Tenants contended Lam provided his credit to allow Choy to obtain loans in excess of what Choy otherwise could have obtained, demonstrating Lam was "a partner in the overall rental business," which included the Properties.

Hearing and Decision

At the hearing on Lam's summary judgment motion, Tenants faulted defense counsel for failing to produce Lam or documents for discovery so they could refute claims made in Lam's declaration. The trial court, however, made no determination that

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the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. Citation to the evidence in support of the position that a fact is controverted must include reference to the exhibit, title, page, and line numbers."

"The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed. [Citation.] As explained by Division One of this court in *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335 . . . , 'Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for . . . summary judgment to determine quickly and efficiently whether material facts are disputed.' " (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.)

Lam unreasonably failed to permit discovery (see § 437c, subd. (i)), and the record reflects no attempt by Tenants to compel further discovery responses or to request a further continuance of the hearing for purposes of discovery.

On the merits, Tenants argued "Lam was actively contributing to this venture whereby six properties were purchased and illegal units were built on all of them." They argued Lam testified at deposition he lent his credit to Choy so Choy could expand his venture by buying more properties. "Where one person contributes their credit to enable another person to do multiple wrongful acts, they are liable under the law." Lam's declaration denying involvement in Choy's broader real estate venture was purportedly suspect because it contradicted the deposition testimony. Moreover, "[t]he mere fact that . . . Lam's name only ended up on two [of Choy's properties] is undermined by the fact that the City sued both of them. It was a stipulated [judgment] against both for a hundred thousand. [Lam] is the only one who paid any monies toward that judgment . . . that applied to all properties. . . . [I]t wasn't as if his payments were then segregated only to the properties his name was on title. . . . [¶] . . . [¶] [I]t makes no sense that somebody would pay toward these properties without having any direct involvement."

The trial court took the matter under submission and later signed an order granting the motion: "[T]he court finds that [Tenants] failed to establish an essential element of each cause of action . . . in that [Tenants] failed to submit admissible evidence sufficient to create a material triable issue of fact, that [Lam] was a proximate cause, actually or vicariously, of any damages claimed by [Tenants] in any cause of action . . . , or breached any duty owed to any [of the Tenants] . . . ." The order cited Lam's declaration as support for each of the 26 undisputed material facts in Lam's separate statement, as adopted in the order.[8]

[8] Lam's separate statement properly phrased the issues "in language appropriate for adoption by the court if the motion is granted. [Citation.] . . . [T]his avoids debate about whether the language of the order properly reflects the issue actually adjudicated." (*United Community Church v. Garcin, supra,* 231 Cal.App.3d at p. 333, fn. omitted, superseded by statute in other respects.)

II. DISCUSSION

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fns. omitted.) "We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Jessen v. Mentor Corp*. (2008) 158 Cal.App.4th 1480, 1484; see *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) " ' "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' " (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)

As relevant here, "[a] defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established . . . ." (§ 437c, subd. (p)(2).) To show a cause of action cannot be established, a moving defendant may either conclusively negate an element of the claim, or show "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 855; see *id.* at p. 854 [moving defendant must "present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" (fn. omitted)].)

" 'Our review of the summary judgment motion requires that we apply the same three-step process required of the trial court. [Citation.] "First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief

on any theory reasonably contemplated by the opponent's pleading. [Citations.] [¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. [Citations.] . . . [¶] . . . [T]he third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." ' " (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 848.)

A. *The Issue as Framed by the Pleadings*

In their unverified complaint, Tenants alleged Lam and Choy were both "legal owners, lessors, operators, managers, and maintainers" of the Properties where Tenants resided. In a written discovery response, they alleged more specifically that Lam "participated with [Choy] in a conspiracy to purchase single-family homes, add units to them without the proper permits or zoning permissions, and illegally rent them to multiple, separate sets of tenants." They alleged Lam was "directly involved" by holding title with Choy to "at least" two properties, by extending credit to Choy so he could buy those properties, by stipulating to a judgment applicable to four properties, and by paying at least half of that judgment personally.

Under the Uniform Partnership Act of 1994 (Corp. Code, § 16100 et seq.), "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership."[9] (Corp. Code, § 16202, subd. (a); see *id.*, § 16101, subd. (9).) A partnership agreement need not be in writing but may be oral or implied. (*Id.*, § 16101, subd. (10).) "Generally, a partnership connotes co-ownership in partnership property, with a sharing in the profits and losses of a continuing business." (*Chambers v. Kay* (2002) 29 Cal.4th 142, 151.) "A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a

[9] Corporations Code section 16202, subdivision (a) applies "[e]xcept as otherwise provided in subdivision (b)," which states that "[a]n association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter." Lam has not argued that Corporations Code section 16202, subdivision (b) applied to his business association with Choy.

wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership." (Corp. Code, § 16305, subd. (a).) With exceptions apparently not relevant here, "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." (*Id.*, § 16306, subd. (a).)

B. *Lam's Initial Burden*

Lam's initial burden of production on summary judgment could be satisfied either by (1) producing evidence sufficient to make a prima facie case that he was *not* liable as a partner for Choy's conduct toward Tenants; or (2) demonstrating through evidence that Tenants did not have and could not obtain evidence that he was liable as a partner for Choy's conduct toward Tenants. Lam pursued both approaches. He averred he was never Choy's partner with respect to the Properties; he had no personal, professional or other relationship with any of the Tenants or connection with the Properties; and, prior to being named a defendant in this litigation, he never spoke with Sutton or Choy regarding the Tenants, actions regarding the Tenants' tenancies or Properties, nor did he have any knowledge of the Properties' condition. Lam declared he "did not know [Choy] bought [the Properties], and had no role in any way whatsoever with [Choy's] activities regarding his ownership, or rental, of those properties. . . . I received no benefit to my knowledge from [Choy's] ownership or operation of either of these properties." Lam's averments were sufficient to negate any theory of legal or equitable ownership in the Properties, or that Lam operated, managed or maintained the Properties—elements essential to all of Tenants' causes of action. Tenants' complaint that Lam did not address every allegation in their complaint misses the point. Once the burden shifts to the plaintiff to present evidence, the plaintiff's inability to meet his/her burden of proof regarding an essential element of the case renders all other facts "immaterial." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780–781.) The question then is whether Tenants produced any legally admissible evidence that would establish a triable issue. (§ 437c, subd. (o)(1).)

C. *Tenants' Evidence*

Tenants insist Lam never met his burden to negate the elements of their pled causes of action and the burden to establish triable issues of fact never shifted to them. As discussed, we disagree. Tenants do not discuss the sufficiency of their own evidentiary showing and only reiterate the allegations of their complaint. However, to defeat a motion for summary judgment, a plaintiff must show " ' "specific facts" ' and cannot rely upon the allegations of the pleadings." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.) Nor can a plaintiff rely on his own pleadings in lieu of or in support of affidavits in opposition to a motion, even if the pleadings are verified. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 147; *Snider v. Snider* (1962) 200 Cal.App.2d 741, 755.) "A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119–1120.)

Tenants' separate statement relied on (1) Lam's deposition testimony, (2) the stipulated judgment, and (3) delivery of a rent check by one of Choy's tenants to Lam's home.[10]

The cited testimony from Lam's deposition, however, concerned only the Co-owned Properties, and Lam's testimony was that he was a passive investor in both of those properties, consistent with his declaration that his role had been limited to providing part of the initial financing for the purchase of those properties as an

[10] Tenants' response to Lam's statement that he had no active involvement in the ownership, operation, or management of the *Co-owned Propertie*s, was to dispute the allegations, relying in part on an assertion that "Rent *checks* were sent and delivered to Mr. Lam's house . . . ." (Italics added.) The evidence cited in support of that contention is the deposition testimony of Francois Asada, another tenant of Choy's, who testified he met Lam when he dropped off a single rent check at Lam's home after a request from Choy in a telephone conversation.

investment.[11] Lam did not, as Tenants contend, admit that he was Choy's partner. Tenants' apparent theory is that Lam's acknowledged participation in the acquisition of two rental properties with Choy, and Lam's expectation that he would share in the appreciation of those properties, necessarily made him a coventurer with Choy in *any* property Choy owned and managed. We are aware of no authority for such a proposition, and Tenants cite to none. They suggest Lam's provision of his credit to assist in the purchases of the two Co-owned Properties provided "assistance" to Choy in his "overall plan to purchase rental properties" and supported Choy's real estate business generally. However, Tenants cite to no evidence showing Lam's participation in the purchases of the Co-owned Properties had any relation to Choy's acquisition, operation, or management of the Properties, or that any lender relied on Lam's credit to provide Choy financing. No evidence has been cited even as to when the Properties were acquired in relation to the Co-owned Properties, or on what terms.[12] "[A]n issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture." (*Horn v. Cushman & Wakefield Western, Inc., supra,* 72 Cal.App.4th at p. 807.)

Tenants argued below the stipulated judgment creates at least an inference that Lam had joint responsibilities for other properties owned by Choy. Tenants barely mention the existence of the stipulated judgment here, and present no argument as to its significance. "Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs' brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

In any event, it is not at all clear the stipulated judgment would constitute admissible evidence against Lam. There was a consent to judgment, but no admission of

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[11] Lam testified at deposition, "I only just sit there, co-own the properties, just sit there and wait. Hopefully wait for a few years for the property value to go up."

[12] In their opening brief, Tenants allege the "homes at issue were purchased in 2007 and 2008 and the structural modifications took place during that time frame." Tenants cite no record evidence to support that claim.

liability. In the concurrent stipulated injunction, Lam and Choy denied the City's allegations against them, and the terms of the stipulated injunction applied to Lam only "in connection with" one of the Co-owned Properties, and applied to Choy with respect to all four properties at issue. Assuming Lam in fact paid at least part of an agreed judgment that constituted a lien against a property in which he held an interest, that payment would provide no evidence he held an interest in any other properties, particularly in light the stipulated injunction's terms.[13] Tenants do not offer, or explain, such an inference.

The final item cited by Tenants is the delivery of a single check by one of Choy's other tenants to Lam on a single occasion. No evidence suggests the check was payable to anyone other than Choy, and no evidence in the record establishes that Lam "accepted" rent for any property.[14] Tenants also have not pointed to any evidence that Lam regularly collected rents or "check*s*" (italics added) on Choy's behalf for the Properties, or for any others, or otherwise participated in Choy's business. Again, Tenants do not suggest how this single instance of accommodation for a relative "enabled Mr. Choy's real estate business to flourish."

Tenants presented speculation and conjecture, and not evidence that would allow a reasonable trier of fact to render judgment in their favor. They failed to meet their burden to establish a triable issue.

D. *Procedural Issues.*

Tenants raise what they contend are procedural defects in Lam's trial court pleadings, and they assert these defects alone require reversal. We disagree.

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[13] Tenants provide no *evidence* Lam paid any part of the judgment. Tenants alleged in discovery that Lam "apparently paid off at least half of the [stipulated judgment] directly," but they never cited to any evidence, either in the trial court or here, of this purported "fact."

[14] Tenants' counsel averred in his supporting declaration below that the check related to one of the Properties, but nothing in the referenced deposition testimony supports this.

Tenants assert that the proof of service for Lam's motion for summary judgment is defective because it was not signed by the person who actually made personal service, and because it failed to list Lam's separate statement on the list of documents served. Significantly, they do not assert here, and did not in the trial court, that actual service of all documents was not made, or that they suffered any prejudice as a consequence. They cite to no authority for the proposition that a defect in the proof of service, as opposed to a defect in the service itself, deprives the court of jurisdiction to act, and would be grounds for automatic reversal. The law is otherwise. Failure to comply with notice requisites is mere procedural error that can be cured by consent or appearance. (2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 101, p. 673.) "It is the fact service was made, rather than the proof of service, that vests the court with jurisdiction to act." (*Otsuka v. Balangue* (1949) 92 Cal.App.2d 788, 791.) Moreover, Tenants' failure to appear specially to object to the service or the proof of service, and responding to the motion waived any right to contest the jurisdiction of the court to hear the motion. (*Id.* at p. 792.)

Tenants also complain the motion was improperly set within 30 days of trial. (§ 437c, subd. (a)(3) [motion to be heard "no later than 30 days before the date of trial"].) The 30-day time limit applies, however, "unless the court for good cause orders otherwise." (*Ibid.*) They again fail to present any legal argument for the proposition that the court somehow lacked jurisdiction to hear the motion, or that it abused its discretion in agreeing to do so.[15] The argument is forfeited.

III. DISPOSITION

Judgment for Lam is affirmed. Tenants shall bear Lam's costs on appeal.

[15] The trial date was continued prior to hearing on the summary judgment motion. The twice-continued hearing on the summary judgment motion was ultimately held within 30 days of trial, but the court expressly found good cause to do so.

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BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.

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